UNITED STATES
v.
CLAUDE T. AND SARAH E. ORME

IBLA 80-955 Decided September 8, 1981

Appeal from decision by Administrative Judge E. Kendall Clarke declaring the Bean Patch Placer Claim placer mining claim null and void. Contest No. CA-5114.

Affirmed; decision adopted.

1. Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally

   Where the Board is in agreement with the result reached in an Administrative Law Judge's decision in a mining claim contest and where the Administrative Law Judge has correctly summarized the facts and properly evaluated the evidence in light of the applicable law, the Board may adopt the decision.

2. Mining Claims: Contests -- Rules of Practice: Government Contests

   In all cases where a party is represented by an attorney, such attorney will be recognized as fully controlling the case on behalf of his client, and service of any document relating to the proceeding shall be made upon such attorney in addition to any other service specifically required by law or by rule, order, or regulation. 43 CFR 4.22(b).

3. Administrative Procedure: Hearings -- Hearings -- Mining Claims: Contests -- Rules of Practice: Hearings -- Rules of Practice -- Government Contests

   Where a party fails to appear or participate in a hearing as scheduled even though no order postponing the hearing has been issued, the merits of the case may be reached and decided on the basis of the record completed at the hearing, despite the absence of evidence in support of the party's case.

APPEARANCES: William R. Neill, Esq., Weaverville, California, for appellants.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Claude T. Orme and Sarah E. Orme appeal from the August 21, 1980, decision of Administrative Law Judge E. Kendall Clarke, declaring the Bean Patch Placer Claim placer mining claim in sec. 26, T. 7 N., R. 7 E., Humboldt meridian, Trinity County, California, null and void for lack of discovery of valuable minerals on the claim. Sarah E. Orme also appeals that portion of the decision which held her failure to appear at the hearing to be a default.

The California State Office, Bureau of Land Management, initiated the contest on behalf of the United States Forest Service. The Government's complaint was personally served on Claude T. Orme for himself and for Sarah Orme on July 12, 1978. It charged, inter alia, that there were not presently disclosed within the boundaries of the mining claim minerals of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery. By letter received August 2, 1978, Sarah Orme denied these charges. A hearing was scheduled for October 19, 1979, and notices were sent to both appellants by certified mail; they were signed for by one K. Sophn as authorized agent. The day before the scheduled hearing, Administrative Law Judge John R. Rampton, Jr., 1/ heard counsel's motion to postpone the hearing because Claude Terry Orme was physically unable to travel due to a recent injury. Counsel also stated he would move to amend the answer to deny generally each allegation in the complaint. The Judge rescheduled the hearing for November 9, 1979, at Redding, California, and on October 26, a notice of confirmation was sent certified mail to the counsel of record.

Prior to taking testimony at the hearing on November 9 Judge Clark heard argument on the motion to amend the answer. As another preliminary matter, counsel advised the court for the first time that he did not represent Sarah Orme and presented to the Judge a letter from her dated November 8, 1979, in which she stated that she knew that the hearing scheduled for October 19, 1979, had been rescheduled for November 9,

1/ The case was originally assigned to Judge Rampton and reassigned to Judge Clark on Oct. 23, 1979.

1979, but that she was not properly served, did not agree to the hearing date, and would not appear. The hearing proceeded. Robert W. Manchester, a geologist, testified for the Government that he examined the claim and found no significant mineral value to indicate a discovery (Tr. 42). Appellant presented no evidence.

[1] We have thoroughly reviewed the record of this case and the arguments advanced by the parties. Judge Clarke's decision sets out a full summary of the testimony, the relevant evidence, and applicable law. We agree with the Judge's findings and conclusions and adopt his decision as the decision of the Board. A copy of it is attached as Appendix A.

Appellants assert on appeal that appellant, Sarah Orme, was not lawfully served with notice of the hearing and was, therefore, denied due process. Appellants' second assignment of error is that the Judge abused his discretion in denying a motion to amend the complaint and the answer, which also resulted in a denial of due process.

[2] Sarah Orme and Claude Orme were served with notices of the original hearing on August 7, 1979, as evidenced by the post office return receipt. The applicable regulation, 43 CFR 4.401(c)(2), provides that "[s]ervice by registered or certified mail may be proved by a post-office return receipt showing that the document was delivered at the person's record address * * *." The notice was mailed to the address on file with BLM and listed on the answer submitted by Sarah Orme.

Counsel represented himself as "ATTORNEY for CONTESTEES" on the document captioned "Request for Postponement." 2/ The document did not show service on Sarah Orme as a separate party. If counsel did not represent Sarah Orme he would have been required to serve her as a separate party. See 43 CFR 4.401(c)(2). This he did not do. At that hearing, counsel requested a postponement because of contestee Claude Orme's illness and advised that he would move to amend the answer filed by contestee Sarah Orme. 3/ The court and the Government obviously perceived that the motion and answer were filed on behalf of both parties, and that counsel did in fact represent both parties. We get that same impression from the record and the following statement by counsel:

2/ Counsel also represents himself counsel for contestees on the amended answer, the notice of appeal, and the statement of reasons.

3/ If Claude Orme and Sarah Orme were separate parties then the answer filed by Sarah was on her own behalf and Claude Orme having never adopted her answer as his own, never filed an answer; so as to him all the allegations of the complaint would have been admitted, and the case as to him could have been decided without a hearing. United States v. Soren, 47 IBLA 226 (1980).

> MR. NEILL: Okay. It appears that there is a letter from Sarah Orme which has been construed as an Answer to the Complaint. It's obvious to me from a brief review of the file that it will be necessary for me to file a motion for an Amended Complaint.
>
> JUDGE: Amended "Complaint," or an "Amended Anssers."? [sic]
>
> MR. NEILL: Amended Answer.

(Tr. 5 (Hearing Oct. 18, 1979)).

The regulation, 43 CFR 4.22(b), provides that where a party is represented by an attorney, service of any documents relating to the proceeding shall be made on such attorney. Accordingly, the service of the confirmation of the hearing date on counsel of record at the postponement hearing would constitute service on Sarah Orme.

Sarah Orme does not allege on appeal that she did not have notice of the hearing or that she was deprived of an opportunity to appear and present evidence. She contends that she was not properly served. We find, however, that there was service on Sarah Orme and that she chose not to attend the hearing, thereby subjecting herself to the jurisdiction of the judge. Given the specific circumstances of this case, we believe the decision was proper.

Moreover, inasmuch as counsel argues that he does not represent Sarah Orme, we wonder why his entire brief, purportedly filed on behalf of Terry Orme, is directed almost solely to the question of service on Sarah Orme. We would also point out that since counsel does not represent Sarah Orme, there has been no proper appeal filed from the Judge's decision with respect to Sarah Orme, and that her interest has been finally adjudicated a nullity. See Rauls v. Secretary of the Interior, 460 F.2d 1200 (9th Cir. 1972).

[3] Where a party fails to appear or participate in a hearing as scheduled even though no order postponing the hearing has been issued, the merits of the case may be reached and decided on the basis of the record as completed at the hearing, despite the absence of evidence in support of the party's case. United States v. Franklin, 45 IBLA 54 (1980); United States v. Mine Development Corp., 27 IBLA 238 (1976); see United States v. Synbad, 42 IBLA 313 (1979); United States v. Knecht, 39 IBLA 9 (1979).

Having reviewed the record, we conclude that appellant's second assertion lacks merit. The Judge considered each paragraph of the complaint not specifically denied, disposed of them and admitted the amended answer (Tr. 6-9).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, we affirm the decision of the Administrative Law Judge and adopt it as our own.

Gail M. Frazier
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

August 21, 1980

United States of America,	:	Contest No. CA-5114
	:	
Contestant	:	Involving the BEAN PATCH
	:	PLACER CLAIM PLACER MINING
v.	:	CLAIM, also known as BEAN
	:	PATCH PLACER MINING CLAIM
Claude T. Orme and	:	Placer Mining Claim
Sarah E. Orme,	:	situated in Sec. 26,
	:	T. 7 N., R. 7 E., Humboldt
Contestees	:	Meridian, Trinity County,
	:	California

DECISION

Appearances: Charles F. Lawrence, Attorney, Office of the General Counsel, U. S. Department of Agriculture, San Francisco, California, for the Contestant.

William R. Neill, Attorney, Weaverville, California, for the Contestees.

Before: Administrative Law Judge Clarke

This contest was initiated with a Complaint issued on May 18, 1978, by the Bureau of Land Management on behalf of the United States Forest Service. A letter was received on August 2, 1978, from Sarah Orme, one of the contestees herein, which was construed by the Bureau of Land Management as a timely Answer on behalf of the contestees. On August 2, 1979, a Notice of Hearing was issued by the Office of Hearings and Appeals, which notice was served upon both contestees, Claude T. Orme and Sarah E. Orme, at their address of record, General Delivery, Denny, California, the area in which the mining claim herein at issue is located.

These notices were received at Denny, California, by K. Spohn, an authorized agent on August 7, 1979. The Notice of Hearing set the hearing for October 19, 1979 in Redding, California. On October 18, 1979, at Redding, California, an Attorney, William R. Neill, of Weaverville, California, appeared before Judge John R. Rampton and moved for a continuance of the hearing set for October 19th, due to the fact that his client, Mr. Orme, was injured and could not travel. At that hearing an agreement was reached with Government counsel to reschedule the matter for Redding, California on November 9, 1979. Mr. Neill also advised the Court that it was his intention to file a Motion for Amendment of the Answer. (See transcript of the Oral Presentation of the Motion for Continuance on October 18, 1979). The captioned matter was reassigned to the undersigned Administrative Law Judge and a Hearing Confirmation Notice was issued October 26, 1979, confirming the agreement for a hearing November 9, 1979, in Redding, California. This notice was served upon William R. Neill, the attorney who made an appearance on October 18, 1979. On October 29, 1979, there was received in the Office of Hearings and Appeals an Amended Answer in which the contestee, Terry Orme denied not only paragraph 5, but paragraph 1, 3, and 4 and so much of paragraph 2, relating to the fact that the contestee was the only party of interest. On October 29, 1979, William R. Neill, filed a Motion for Further Continuance, based on the alleged inability of a witness to testify at the hearing which was then scheduled. On November 2, 1979, an Order was issued setting a hearing on the Motion to Amend the Answer for November 9, 1979 in Redding, California.

In the Complaint which was issued on May 18, 1979, paragraph 5, alleges:

a. There are not presently disclosed within the boundaries of the mining claim minerals of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery.

b. The land embraced within the claim is nonmineral in character.

c. The claim is not held in good faith for mining purposes.

At the hearing on November 9th, Mr. William R. Neill, appeared, stating that he represented a Claude T. Orme. The contestant objected to bringing into issue matters other than those contained in paragraph 5, such as denying that the mining claim was on public lands of the United States or that the contestee was 21 years old. Amendment to the Complaint was permitted so far as requiring the Government to show that the lands embraced by the claim were public lands of the United States and the Government was allowed 30 days in which to furnish said proof. In addition counsel for the contestee Terry Orme, advised the Court that there was an ejectment action pending in the United States District Court of California, United States v. Claude Orme, Civil Case No. S 75-670-2 JM (Tr. 6) with respect to the claim. Further the Court was advised that an individual by the name of David Garner owned a one-half interest in the claim (Tr. 7) but that the transaction was not of public record. The Court was also advised that Mr. Neill did not represent Mrs. Orme and was presented with a letter that was marked as exhibit D. In the letter dated November 8, 1979, and signed by Sarah Orme, Mrs. Orme stated she did not receive a notice of the hearing, but understood that it was originally set for October 19th and had been rescheduled for November 9th, and that she did not plan to be present before the Court on November 9th, for the reason that she had not consented to the hearing being on that date. There is nothing on the record of October 18th, where Mr. Neill appeared before Judge Rampton, to indicate that he represented only Claude T. Orme. The Motion for Continuance was denied for the reason that the witness, whose absence was the basis for the request for a further continuance, had last been contacted and requested to appear in August, 1980. (Tr. 13 & 16).

Summary of Testimony

Robert Manchester, from Missoula, Montana, Chief of the Branch of Mineral Management and Geology for the Northern Region of the Forest Service was called as witness by the contestee. Mr. Manchester testified that he examined the Bean Patch Placer belonging to Claude T. Orme and Sarah E. Orme. Exhibit 8 is a sketch map of that claim which was made by him after the corners were shown by Mr. Orme's son, Barry Orme. (Tr. 26). An examination was conducted September 4, 1977. Mr. Manchester was accompanied by two other Forest

Service mineral examiners, John Collier and Mike Owens, as well as other Forest Service personnel to assist in the sampling. Mr. Claude Orme was present, as well as Barry Orme and Sarah Orme, along with 20 to 30 other friends of the claimants. Also in attendance at the time of the hearing was Mr. VanCort, U. S. Marshal and five deputy marshals, one or two deputy sheriffs and other Forest Service special agents. Mr. Orme and his son pointed out the claim corners on the ground. (Tr. 27).

Mr. Orme claimed the discovery was in the river and that location was principally for gold and platinum. Mr. Manchester found no cuts or other openings, so proceeded to a low bar, which at the time of examination was out of the water, but under conditions of high water would have been covered. (Tr. 28). At this point he dug a pit among very large boulders. He did not reach bedrock. Samples were taken and labeled. At the time he took the samples there was a dredge working in the river. The second sample was below the dredge operation. Sample 3 was across the river on an outcrop of bedrock which was a natural trap and normally would have been under water. (Tr. 29). Samples were taken to the Ranger Station and run through a Denver Gold Saver. (Tr. 30). The claimant was present at the washing of the samples in the Denver Gold Saver. Some of the concentrated samples showed colors (flakes of gold).

The large concentrates were delivered to the Metallurgical Laboratory with a request for an assay. Exhibit 8 shows the sample points. (Tr. 32). Accompanying the samples to the assayer were specific instructions. (Ex. 9 & 10). As a result of the request for assay a Report of Analysis was returned. (Ex. 11). Using the results of the analysis furnished by the Metallurgical Laboratories Mr. Manchester calculated the value of the gold on two different basis, the higher value being $400 per ounce. It was his opinion that even at $400 per ounce with the highest value of $3.95 for sample BP-1, the cost of mining would be much greater than the value present in the Samples. A spectrographic analysis was also run of the samples and it was his opinion that the analysis shown from the spectrographic examination indicated values to be similar to what one would normally find in the earth's crust. Mr. Manchester was of the opinion that a prudent man would not be justified in spending his time and means with a reasonable prospect of developing a paying mine on the claim here in question. (Tr. 42).

The contestee declined the opportunity to present any evidence.

Applicable Law

Under the mining laws of the United States [30 U.S.C. Sec. 22, et seq. (1976)], the discovery of a valuable mineral deposit is essential if a claim is to be held valid. There must be found within the limits of a lode mining claim a vein or lode of quartz, or other rock in place, bearing mineral of such quantity and quality that a prudent person would expend his time and means with a reasonable prospect of success in developing a valuable mine. Converse v. Udall, 399 F.2d 616 (9th Cir. 1968) cert. denied, 393 U.S. 1025 (1969); Barton v. Morton, 498 F.2d 288 (9th Cir.) cert. denied, 419 U.S. 1021 (1974).

In a mining contest the mining claimant is the proponent of a rule or order that he has complied with the mining laws, and has the ultimate burden of proof. The Government assumes the burden of going forward with sufficient evidence to establish a prima facie case of invalidity. When this has been done the burden shifts to the claimant to show by preponderance of the evidence that his claim is valid. United States v. Zweifel, 508 F.2d 1150, 1157 (10th Cir. 1975); Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959); United States v. Alex Bechthold, 25 IBLA 77, 82 (1976).

A prima facie case that a discovery of a valuable mineral deposit is lacking is established when a Government mineral examiner gives his expert opinion that he examined a claim and found insufficient values to support a finding of discovery. United States v. Jon Zimmers and Claire Kelly, 44 IBLA 142 (1979); United States v. Fisher, 37 IBLA 80 (1978).

Summary and Determination

Mr. Manchester a highly experienced mining engineer made an examination of this claim in a manner which should have revealed the type of mineralization present and the results were such that it was his conclusion that a reasonably prudent man would not be justified in spending his time and means with a reasonable prospect of developing a paying mine. In fact, the values were lower than the cost would have been to extract the mineral. This is clearly a prima

facie case and here the contestee Terry Orme being present before the Court, and represented, declined to offer any testimony in rebuttal to the Government's prima facie case.

Therefore, I find that the Government has sustained the charge contained in Paragraph 5a. A determination with respect to Paragraphs 5b and 5c is not necessary. I find that the Government has answered any question that may have resulted in the limited amendment of the Answer to the Complaint, particularly in regard to the fact that the mining claim here in question is located on public land of the United States. The alleged additional partial owner of the claim is not a matter of record and therefore not subject to any notification concerning the hearing.

Sarah E. Orme was served at her record address listed with the Bureau of Land Management. That service was accepted by a person at the address more than thirty days before the date of the hearing. The same person accepted service on behalf of Claude T. Orme. Sarah Orme did not present herself for hearing on October 19th, the day of the scheduled hearing even though exhibit D, her letter of November 8, 1979, states that she was aware of the October 19, 1979 hearing date as she was also aware of the rescheduled hearing on November 9, 1979. Although in her letter, exhibit D, she has requested personal service she has provided no address where such personal service can be effectuated. Her assertions of lack of service do not have the appearance of good faith. I find from exhibit D and the circumstances surrounding the original service, together with the fact that Judge Rampton was not advised by the attorney, William R. Neill, at the hearing on the Motion for Continuance, October 18, 1979, that he did not represent Sarah Orme, that Sarah Orme had actual notice of the continued hearing on November 9, 1979, and that the Court had jurisdiction over her. Her failure to appear at that hearing is hereby taken as a default.

The subject claim, the Bean Patch Placer Claim also known as Bean Patch Placer Mining Claim, located in Section 26, T. 7 N., R. 7 E., Humboldt Meridian, Trinity County, California is hereby declared null and void.

E. Kendall Clarke
Administrative Law Judge